

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>NADEAN DAVIS</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 231,196
<b>SERVICE MASTER EAST</b>	)	
Respondent	)	
AND	)	
	)	
<b>KS MANUFACTURERS AND COMMERCE SIF</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier appeal Administrative Law Judge Jon L. Frobish's January 4, 2002, preliminary hearing Order.<sup>1</sup>

**ISSUES**

The Administrative Law Judge (ALJ) ordered respondent, Service Master East, as a separate party and not jointly with its group-funded pool Kansas Manufacturers and Commerce Self Insurance Fund (KMC),<sup>2</sup> to pay claimant the previously ordered weekly temporary disability benefits.

On appeal, respondent and its group-funded pool KMC both argue: (1) that the ALJ exceeded his jurisdiction when he relied on evidence not contained in the preliminary hearing record in reaching his preliminary hearing decision; and, (2) the preliminary hearing

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<sup>1</sup> The ALJ's preliminary hearing Order indicates the "DATE OF ORDER: January 3, 2002," and "DATE OF HEARING: January 4, 2002." Those dates are apparently reversed as the preliminary hearing transcript indicates that the preliminary hearing was held on January 3, 2002, instead of the January 4, 2002, date noted in the Order. The correct preliminary hearing Order date should be January 4, 2002, and the correct hearing date should be January 3, 2002.

<sup>2</sup> The ALJ, in his January 4, 2002, preliminary hearing Order, found the Kansas Manufacturers and Commerce Self Insurance Fund was actually known as the Kansas Transportation and Industry Self Insurance Fund. But Mr. Kubin the attorney for the Kansas Manufacturers and Commerce SIF in a March 6, 2002, letter to Philip Harness, Director of the Division of Workers Compensation, by enclosing a copy of certificate of insurance, clarified that respondent is insured by the Kansas Manufacturers and Commerce SIF and not Kansas Transportation and Industry SIF.

Order is void because the preliminary hearing was held less than 20 days from the filing of the application for preliminary hearing.

Respondent, separately and not jointly with KMC,<sup>3</sup> also appeals and argues: (1) that the ALJ exceeded his jurisdiction when he ordered the respondent to pay temporary total disability benefits to the claimant without providing respondent the opportunity to be heard; and, (2) that the ALJ exceeded his jurisdiction when he relied on evidence outside the preliminary hearing record in reaching his preliminary hearing decision.

Conversely, claimant requests the Appeals Board (Board) to affirm the ALJ's preliminary hearing Order. Claimant argues the preliminary hearing statute only requires a 7 day written notice and not a 20 day notice as argued by the respondent. Claimant contends she provided respondent and KMC with notice that complied with the 7 day notice requirement. Additionally, claimant contends that the ALJ did not commit reversible error when he contacted the Workers Compensation Division (Division) to determine the current legal status of the group-funded workers compensation pool.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the preliminary hearing record and considering the arguments contained in the parties' briefs, the Board makes the following findings and conclusions:

Claimant filed her Application for Hearing in this matter on February 23, 1998. In that application she alleged she was exposed to ozone causing her to suffer from an occupational disease. Respondent and KMC voluntarily provided medical treatment for claimant's occupational disease and then provided temporary total disability compensation since December 31, 1998, as a result of a January 26, 1999, preliminary hearing Order.

On October 23, 2001, claimant sent respondent and KMC a Notice of Intent letter, pursuant to K.S.A. 44-534a(a)(1), demanding payment of medical mileage and prescription costs or an application for preliminary hearing would be filed within 7 days. Thereafter, claimant filed her Application for Preliminary Hearing on November 2, 2001. Both a copy of the Notice of Intent letter and a copy of the Application for Preliminary Hearing were mailed to Kip A. Kubin, attorney for respondent and KMC. A notice of preliminary hearing dated November 21, 2001, with a certificate of service indicating a copy was mailed to Mr. Kubin was filed with the Division on November 26, 2001, stating that a preliminary hearing would be held before ALJ Jon L. Frobish on January 3, 2002, at 1:00 p.m.

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<sup>3</sup> After the January 4, 2002, preliminary hearing Order was entered, attorney Kathleen Wohlgemuth entered her appearance in this matter on behalf of respondent Service Master East. Mr. Kubin, however, has not withdrawn as attorney for respondent and is still shown as attorney of record for both respondent and its group-funded pool.

In a second Notice of Intent letter dated December 12, 2001, claimant demanded, pursuant to K.S.A. 44-534a(a)(1), that a temporary total disability check from KMC in the amount of \$277.10 be paid because the check was returned from the bank stamped "REFER TO MAKER." Claimant also requested a reimbursement of \$5.00 for a bank service charge resulting from the returned check.

The January 3, 2002, preliminary hearing was held with claimant appearing in person and by her attorney Robert R. Lee. Respondent and KMC appeared by telephone through their attorney Mr. Kubin. Claimant did not testify and contained in the preliminary hearing transcript are only statements of the attorneys and respondent's Exhibit No. 1, a letter from Mr. Kubin to Mr. Lee dated December 14, 2001. Claimant's preliminary hearing requests were for the ALJ to order respondent to pay the weekly temporary total disability compensation payments directly to the claimant because of the last two temporary total disability compensation checks issued from KMC were dishonored and returned not paid. Claimant also requested respondent to reimburse claimant's attorney for the \$5.00 bank service charge for each returned check. Additionally, claimant requested payment of unpaid medical mileage of \$185.28 and reimbursement for prescription costs in the total amount of \$150.41.

Mr. Kubin explained, as he had set out in his December 14, 2001, letter to claimant's attorney, that KMC was involved in a dispute with the Kansas Insurance Commissioner (Commissioner). As a result of the dispute, the Commissioner had placed a hold on the KMC's bank account. Additionally, Mr. Kubin represented that supposedly there were adequate funds available to pay benefits, but because of the dispute between KMC and the Commissioner benefits could not be paid.

The ALJ found there was no evidence that the respondent was insolvent and, therefore, ordered the respondent to directly pay the claimant the temporary total disability benefits due. In the ALJ's preliminary hearing Order, he stated he made inquiry to the Division in an effort to find the reason the Commissioner had placed a hold on KMC's bank account. Respondent separately and respondent through KMC argue that the ALJ's preliminary hearing Order should be reversed because he exceeded his jurisdiction when he relied on information he acquired outside the preliminary hearing record in reaching his decision. The Board finds, however, that the information the ALJ acquired outside the preliminary hearing record was not materially different, or did not otherwise add any relevant information, from that already contained in the preliminary hearing transcript and Exhibit No. 1 admitted therein. The information contained in the preliminary hearing transcript indicates claimant had not been paid ordered weekly temporary total disability benefits because the Commissioner had a hold on KMC's bank account. That is the same information the ALJ acquired in the inquiry he made outside the preliminary hearing record.

The purpose of the Kansas Workers Compensation Act (Act) is to expeditiously provide compensation to injured workers.<sup>4</sup> If the Act applies, which it does in this case, the employer is liable to pay compensation to the employee.<sup>5</sup> The employer is required to secure the payment of compensation to its employees by either insuring the payment through an insurance carrier, or by qualifying as a self-insured or by securing a membership in a qualified group-funded workers compensation pool.<sup>6</sup>

Here, the employer is a member of a qualified group-funded pool. But if the employer has no insurance to secure the payment of compensation, and the employer is financially unable to pay the compensation, the injured worker may apply to the director for the compensation benefits to be paid by the workers compensation fund.<sup>7</sup> And it is not the claimant's burden to prove the employer is uninsured or otherwise unable to pay the owed compensation benefits.<sup>8</sup>

The Board finds the ALJ did not exceed his jurisdiction when he ordered respondent to directly pay the temporary total disability benefits previously ordered because respondent's group-funded pool was not fulfilling its contractual obligation to pay the ordered benefits. The Board concludes the Act requires the respondent to secure payment of workers compensation benefits and absent proof of its insolvency the respondent is required to pay such benefits. Any dispute between the respondent and KMC concerning KMC's obligation to pay workers compensation benefits to respondent's injured employees is a separate contract dispute between those parties that does not involve the claimant.

The respondent and KMC also argue that the ALJ's preliminary hearing Order is void because the January 3, 2002, preliminary hearing was held less than 20 days after the application for hearing was filed. The 20 day time limitation, as referenced by the respondent and KMC, applies to the application for hearing required to be filed when the parties cannot agree upon the worker's right to compensation. This is the method prescribed to follow to docket a workers compensation case with the Division and then assign the case to an ALJ. The ALJ cannot proceed to hear evidence on the claim and make findings concerning the amount of compensation due, if any, to the worker in less than 20 days from the date of filing of the application for hearing.<sup>9</sup>

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<sup>4</sup> See Workers Compensation Fund v. Silicone Distributing, Inc., 248 Kan. 551, 556-57, 809 P.2d 1199 (1991).

<sup>5</sup> See K.S.A. 44-501(a).

<sup>6</sup> See K.S.A. 2001 Supp.44-532(b).

<sup>7</sup> See K.S.A. 44-532a(a).

<sup>8</sup> See Helms v. Pendergast, 21 Kan. App. 2d 303, Syl. ¶ 5, 899 P.2d 501 (1995).

<sup>9</sup> See K.S.A. 44-534(a).

In this case, the claimant filed her Application for Hearing on February 23, 1998. The subject preliminary hearing was held on January 3, 2002, clearly beyond 20 days following the date the Application for Hearing was filed. Thus, the Board finds that the respondent and KMC's argument that the preliminary hearing was held in less than 20 days from filing of the application is without merit.

The disputed issues in this case involve a preliminary hearing and a subsequent preliminary hearing order. The preliminary hearing statute requires the employee or employer to provide the adverse party with notice of the intent to file an application for preliminary hearing at least 7 days before its filing. If the parties do not agree to the benefit change sought, the party seeking the benefit change then may file an Application for Preliminary Hearing. That application is assigned to an ALJ who shall set the matter for hearing and shall give at least 7 days notice of the hearing to the parties.<sup>10</sup>

Here, the claimant first sent respondent a Notice of Intent letter dated October 23, 2001, with a copy to Mr. Kubin, attorney for respondent and KMC. The demand was for respondent to reimburse claimant for medical mileage and cost of prescriptions. On November 2, 2001, claimant filed an Application for Preliminary Hearing which was assigned to ALJ Jon L. Frobish with a copy of the application sent to the respondent, KMC and KMC's attorney. Claimant in a notice dated November 21, 2001, and filed with the Division on November 26, 2001, notified respondent and KMC that a preliminary hearing would be held on January 3, 2002. Thereafter, claimant in a December 12, 2001, Notice of Intent letter made a demand on respondent to pay a temporary total disability check from KMC in the amount of \$277.10 that had been deposited and returned not paid. Also, claimant requested reimbursement for a \$5.00 bank service charge in connection with the return of the check. A copy of the letter was sent to Mr. Kubin.

The January 3, 2002, preliminary hearing was held with claimant appearing in person and by her attorney Robert R. Lee, and respondent and KMC appearing by their attorney Mr. Kubin by telephone. No objection was made by respondent and KMC concerning improper notification of the time and the place of the preliminary hearing.

Respondent, separately, also raises a notice issue claiming the ALJ exceeded his jurisdiction by requiring respondent to pay compensation benefits directly to claimant when respondent was not provided with an opportunity to be heard. The respondent claims it did not receive notice of the January 3, 2002, preliminary hearing.

The respondent and KMC appeared at the preliminary hearing through their attorney Kip A. Kubin. Mr. Kubin also has represented to the Board, through his Application for Review and letter brief, that he not only represents KMC but also represents the respondent in this appeal. There is nothing in the record indicating Mr. Kubin has

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<sup>10</sup> See K.S.A. 44-534a(a)(1).

withdrawn as attorney for respondent. Claimant notified the respondent of the time and date of the hearing when a copy of the notice was sent to respondent and KMC's attorney Mr. Kubin in the notice dated November 21, 2001.

The Board concludes that claimant complied with all the statutory requirements as contained in the preliminary hearing statute and both the respondent and KMC received a Notice of Intent letter and also received notice of the pending preliminary hearing more than 7 days before the hearing was held.

The issues raised by the respondent separately, and respondent through KMC from the ALJ's January 4, 2002, preliminary hearing Order are issues requesting payment of temporary total disability and medical treatment benefits. The preliminary hearing statute specifically gives the ALJ authority to grant or deny temporary total disability compensation following a preliminary hearing.<sup>11</sup> Unless the ALJ otherwise exceeded his jurisdiction in ordering the payment of temporary total disability benefits or medical treatment, the Board, at this point in the proceeding, does not have jurisdiction to review those issues.<sup>12</sup> As noted above, the ALJ did not otherwise exceed his jurisdiction and the Board, therefore, finds the ALJ's preliminary hearing Order should be affirmed.

**WHEREFORE**, it is the finding, decision, and order of the Board that ALJ Jon L. Frobish's January 4, 2002, preliminary hearing Order, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 2002.

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BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant  
Kip A. Kubin, Attorney for Respondent and Kansas Manufacturers and Commerce SIF  
Kathleen N. Wohlgemuth, Attorney for Respondent  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director, Division of Workers Compensation

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<sup>11</sup> See K.S.A. 44-534a(a)(2).

<sup>12</sup> See K.S.A. 2001 Supp. 44-551b(2)(A).